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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

GURGEN ASLANYAN

Plaintiff and Appellant,

v.

PACIFIC SPECIALTY INSURANCE
COMPANY,

Defendant and Respondent.

B233276

(Los Angeles County
Super. Ct. No. LC084925)

APPEAL from a judgment of the Superior Court of Los Angeles County. James
A. Kaddo, Judge. Affirmed.

Robert H. Roe; The Silverberg Law Corporation and Robert Silverberg for
Plaintiff and Appellant.

Wesierski & Zurek, Thomas W. Ely and Laura J. Barns for Defendant and
Respondent.

Plaintiff and appellant Gurgen Aslanyan (plaintiff) appeals from the judgment entered in favor of defendant and respondent Pacific Specialty Insurance Company (defendant) after the trial court granted defendant's motion for nonsuit in this action for breach of contract. Plaintiff contends the trial court erred by concluding his claim for theft loss was not covered under the homeowners insurance policy issued by defendant. We affirm the judgment.

FACTUAL BACKGROUND

1. Plaintiff's theft loss

Plaintiff purchased an existing home in Woodland Hills, California in April 2007. Neither plaintiff nor any member of his family inhabited the Woodland Hills home during the period between the close of escrow and the date of the reported theft of personal property from the home. Rather, they lived at the home of plaintiff's mother-in-law. After escrow closed, plaintiff and his family did move various items of personal property into the home. They also began undertaking substantial renovation of the home.

To oversee the renovation, plaintiff hired a supervisor who was generally onsite during normal business hours from Monday through Friday. Plaintiff also hired day laborers who performed work at the home during normal business hours on weekdays. The hired workers, along with plaintiff and his family members, also worked on Saturdays.

In 2008, plaintiff purchased various materials to be used in the renovation, such as granite floor tiles, kitchen cabinets, lights, and fireplace moldings, and moved those items into the Woodland Hills home. Sometime between March 29 and March 31, 2008, thieves broke through the locked front gate of the Woodland Hills home and stole granite tiles, tools, fireplace moldings, and other materials purchased by plaintiff. Plaintiff filed a police report and on April 30, 2008, submitted a claim to defendant for loss sustained as a result of the theft.

Plaintiff's claim was supported by copies of invoices showing the items purchased, the date of purchase, and the purchase price. One of those invoices showed that \$144,470.45 worth of materials and supplies were purchased on March 6, 2008.

Plaintiff moved these items into the Woodland Hills home between March 6 and March 10, 2008.

2. Relevant provisions of the homeowners policy

At the time plaintiff opened escrow to purchase the Woodland Hills home, he obtained from defendant a homeowners insurance policy for that home with a term of April 2, 2007 through April 2, 2008.

Property coverages

Section I of the homeowners policy describes the property covered under the policy. Coverage A pertains to the dwelling, Coverage B pertains to other structures, and Coverage C to personal property. The dwelling coverage provides as follows:

“COVERAGE A – Dwelling

“We cover:

“1. The dwelling on the residence premises shown in the Declarations, including structures attached to the dwelling; and

“2. Materials and supplies located on or next to the residence premises used to construct, alter or repair the dwelling or other structures on the residence premises.”

The personal property coverage provides in relevant part as follows:

“COVERAGE C – Personal Property

“We cover personal property owned or used by an insured while it is anywhere in the world. Subject to the limits set forth herein

[¶] . . . [¶] Our limit of liability for personal property which is the subject of loss by theft at any location other than the residence premises, is 10% of the limit of liability for Coverage C set forth on the Declaration Page, or \$1000, whichever is greater. Personal property in a newly acquired principal residence is not subject to this limitation for the 30 days from the time you begin to move property there.”

Perils insured against

For each category of covered property, the policy specifies the types of perils insured against. Section 2c of the “Perils Insured Against” section of the policy insures against direct property loss in or to the dwelling (Coverage A), and other structures (Coverage B), but excludes coverage for theft in a dwelling under construction, or theft of materials and supplies intended for use in construction, unless the dwelling is both finished and occupied. Section 2c provides in relevant part:

“We insure against risks of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:

“[¶] . . . [¶]

“2. Caused by:

“(c) Theft in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied.”

Paragraph 9 of the “Perils Insured Against” section of the policy covers direct physical loss of personal property (Coverage C), but excludes coverage for theft loss that occurs after the dwelling has been unoccupied for more than 30 consecutive days. It provides in relevant part as follows:

“We insure for direct physical loss to the property described in Coverage C cause[d] by a peril listed below

“[¶] . . . [¶]

“9. Theft.

“This peril does not include loss caused by theft:

“a. Committed by an insured;

“b. In or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied.

“This peril does not include loss caused by theft that occurs to property on the residence premises if the dwelling has been vacant or unoccupied for more than 30 consecutive days immediately before the loss. This peril does not include loss caused by theft that occurs to property on the residence premises by an insured, relative, tenant, guest, invitee or licensee.”

Occupancy Endorsement

Finally, the policy contains an occupancy endorsement, No. NYM3, that states:

“It is a condition of this policy that any vacancy or unoccupancy of the described building after the inception date of the policy must be reported to the Company.

“It is understood and agreed that this Company shall not be liable for loss occurring while a described building, whether intended for occupancy by the owner or tenant is vacant, or unoccupied beyond a period of sixty consecutive days, any Uniform, Standard or other forms notwithstanding.

“VACANCY is defined as: when the unscheduled personal property or a substantial portion thereof have been removed for a period of sixty (60) days, the dwelling shall be deemed vacant.

“All other terms and conditions of this policy remain unchanged.”

3. Defendant’s denial of coverage

After investigating plaintiff’s claim, defendant denied coverage for plaintiff’s loss. In a letter dated December 11, 2008, defendant advised plaintiff that its investigation indicated that plaintiff commenced extensive remodeling and construction work on the Woodland Hills home in April 2007, that the construction work was ongoing at the time of the theft loss, and that plaintiff resided in a home other than the Woodland Hills home from the year 2000 through the date of the theft loss. Defendant informed plaintiff that the occupancy endorsement to the policy, as well as the policy provisions excluding coverage for theft loss in a dwelling that is unoccupied for more than 30 consecutive days, or under construction at the time of the theft, precluded coverage for plaintiff’s loss.

PROCEDURAL HISTORY

Plaintiff filed this action against defendant and his insurance broker, alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence. Plaintiff subsequently settled with the broker. The parties then stipulated to dismissal of the cause of action for breach of the implied covenant of good faith and fair dealing. As a result, the only cause of action remaining at the time of trial was the cause of action for breach of contract.¹

Before trial, defendant filed several motions in limine, three of which are relevant to this appeal. The first in limine motion requested an order to instruct the jury on the meaning of the word “unoccupied” in accordance with case law which holds that a dwelling is not occupied unless a person lives and sleeps there habitually. The second motion in limine requested an order to instruct the jury on the meaning of the words “under construction” as used in the policy. The third motion requested an order excluding statements, evidence, and argument that the policy states a home under construction is not vacant. The trial court granted all three of these motions.

After the trial court’s ruling on the motions in limine, plaintiff advised the court that in light of the court’s rulings, he could not prevail at trial and there was no point in going forward. The parties and the trial court agreed that plaintiff would submit to the court a written opening statement. Defendant thereafter moved for nonsuit, and the trial court granted that motion. Judgment was entered in favor of defendant, and this appeal followed.

DISCUSSION

I. Standard of review

Plaintiff contends the trial court erred by granting the motion for nonsuit because the exclusions upon which defendant relied are not conspicuous, plain, or clear and are therefore unenforceable. Plaintiff further contends he was entitled to coverage under the

¹ The negligence cause of action was against the insurance broker only.

policy because the Woodland Hills home was neither vacant nor unoccupied at the time of the theft.

“In reviewing a judgment entered upon a grant of a motion for nonsuit after the close of the plaintiff’s case-in-chief (Code Civ. Proc., § 581c), the appellate court reviews the entire record of the trial court [citation] and views the evidence in the light most favorable to appellant. [Citation.] We do not weigh the evidence or consider the credibility of the witnesses who have testified; rather we are required to accept as true the evidence most favorable to the plaintiff, disregarding conflicting evidence. [Citation.] ““The judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff’s case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.”” [Citation.]” (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1327, fns. omitted.)

This appeal concerns the application of various provisions of an insurance policy to undisputed facts. ““The interpretation of an insurance policy as applied to undisputed facts . . . is a question of law for the [appellate] court, which is not bound by the trial court’s construction.’ [Citation.]” (*Bjork v. State Farm Fire & Casualty Co.* (2007) 157 Cal.App.4th 1, 6, quoting *Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 590.)

II. Principles of insurance policy interpretation

Interpretation of an insurance contract is governed by the general rules of contract interpretation. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) Under these rules, the mutual intention of the parties at the time the insurance contract is formed governs interpretation, and such intent is to be inferred, if possible, solely from the written provisions of the policy. (Civ. Code, § 1636; *TRB Investments, Inc. v. Fireman’s Fund Ins. Co.* (2006) 40 Cal.4th 19, 27 (*TRB Investments*).) The “clear and explicit” meaning of the policy provisions in their “ordinary and popular sense” controls their interpretation, unless “used by the parties in a technical sense, or unless a special meaning is given to them by usage.” (Civ. Code, § 1644; *TRB Investments*, at p. 27.) The policy language must be read in the context of the instrument as a whole and a

provision will be considered ambiguous when it is capable of two or more reasonable constructions. (*Ibid.*) If a policy provision is ambiguous, the ambiguity must be resolved in the insured's favor, consistent with the insured's reasonable expectations. (*Id.* at pp. 27-28.)

III. Plaintiff's theft loss was excluded under the policy

Although loss of personal property caused by theft is a peril covered under the policy, plaintiff's theft loss of materials and supplies used to renovate the Woodland Hills home was excluded under paragraph 2c of the "Perils Insured Against" section of the policy applicable to dwellings (Coverage A), under paragraph 9b of the "Perils Insured Against" section of the policy applicable to personal property (Coverage C), and under the occupancy endorsement to the policy.

A. Occupancy endorsement

The occupancy endorsement to the policy excludes coverage for loss occurring while the home "is vacant, or unoccupied beyond a period of sixty consecutive days." "Vacancy" is defined in the endorsement as "when the unscheduled personal property or [a] substantial portion thereof have been removed for a period of sixty (60) days." The term "unoccupied" is not defined in the policy; however, its meaning has been established by California case authority.

In *Foley v. Sonoma County Farmers' Mut. Fire Ins. Co.* (1941) 18 Cal.2d 232 (*Foley*), the California Supreme Court interpreted the meaning of the term "unoccupied" in the context of a first party insurance policy. The court concluded that "'a dwelling house will not be regarded as occupied unless it is the home or dwelling place of some person living and sleeping there habitually, not every night, but usually and ordinarily, who when temporarily absent, returns to it as a place of abode.'" [Citations.]" (*Id.* at p. 235.)² The court in *Foley* distinguished the terms "unoccupied" and "vacant," noting that

² The court in *Foley* considered the following clause in a fire insurance policy for a dwelling: "'Unless otherwise provided by agreement indorsed hereon, or added hereto this company shall not be liable for loss or damage occurring . . . while a building herein

“the terms are neither synonymous nor complementary.” (*Id.* at p. 234.) The court stated: “The term ‘vacant’ is associated with removal of inanimate objects from a dwelling; the term ‘unoccupied’ is associated with the abandonment of that dwelling as a customary abode [¶] . . . The vacancy of a dwelling does much to strengthen the conclusion that it is unoccupied, as the presence of furnishings does much to strengthen the conclusion that it is occupied. But a dwelling that is not vacant is not necessarily occupied, and inanimate objects cannot of themselves render a dwelling occupied. It is neither the physical presence of inanimate objects alone, nor the physical presence of human occupants alone which characterizes an occupied dwelling. It is the habitual use of the inanimate objects by the human occupants that animates the dwelling and renders it occupied, that transforms four walls into a home. . . .” (*Id.* at p. 235.)

1. The Woodland Hills home was unoccupied

At the time plaintiff’s theft loss occurred, the Woodland Hills home was unoccupied under the definition set forth in *Foley*. Plaintiff admits that he and his family did not habitually sleep in the Woodland Hills home during the 60 days immediately preceding the theft loss. Rather, the family slept in, and habitually returned to his mother-in-law’s house. Plaintiff’s theft loss was therefore excluded under the occupancy endorsement to the policy.

2. Construction activity does not constitute occupancy

Plaintiff contends the Woodland Hills home was not “unoccupied” during the renovation because workers and others were present and performing construction activity during normal business hours. Construction activity does not constitute occupancy within the meaning of the policy. “When no one actually resides in a house, altering, repairing or the process of moving the building does not constitute occupancy.

[Citations.]” (*Mauck v. Northwestern Nat’l Ins. Co.* (1929) 102 Cal.App. 510, 515

[interpreting provision in fire insurance policy stating that insurer “shall not be liable for

described, whether intended for occupation by owner or tenant is vacant or unoccupied beyond the period of ten consecutive days.” (*Foley, supra*, 18 Cal.2d at p. 234.)

loss” while house is “vacant or unoccupied beyond the period of ten consecutive days”].)

TRB Investments, on which plaintiff relies, does not support his argument that construction activity in a home in which no one lives constitutes occupancy of the home. In that case, the Supreme Court considered the meaning of the term “under construction” in a vacancy exclusion set forth in an endorsement to a commercial property insurance policy. The endorsement excluded coverage for loss or damage to a building that had been vacant for more than 60 days prior to the occurrence of the loss or damage, but excepted from that exclusion buildings “under construction.” (*TRB Investments, supra*, 40 Cal.4th at p. 24.) The endorsement stated that “[b]uildings under construction are not considered vacant.” (*Ibid.*)

The insurer in *TRB Investments* argued, and the Court of Appeal agreed, that the term “under construction” as used in the endorsement did not encompass renovations to an existing structure. (*TRB Investments, supra*, 40 Cal.4th at p. 25.) The Supreme Court disagreed, concluding that the common meaning of the term “under construction” includes renovation and repair work and that the vacancy exclusion accordingly did not apply. (*Id.* at pp. 26-31.)

Unlike the vacancy exclusion in *TRB Investments*, the exclusion at issue here contains no exception for loss that occurs while the home is “under construction.” To the contrary, the policy expressly excludes from coverage loss caused by theft “[i]n or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied.” *TRB Investments* is therefore inapposite.

It is undisputed that renovation work at the Woodland Hills home was unfinished at the time the construction materials were stolen from the home. It is also undisputed that plaintiff and his family never lived in the Woodland Hills home from the close of escrow until the theft occurred. The theft loss was accordingly excluded under the occupancy endorsement to the policy.

3. The occupancy endorsement is conspicuous, plain and clear

Plaintiff contends the occupancy endorsement is unenforceable because it is not conspicuous, plain, and clear. (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1213.) To support this contention, plaintiff advances only two arguments -- the endorsement appears in “small print toward the back of the policy,” and he assumed that a home undergoing renovation would not be considered “unoccupied” within the meaning of the policy. These arguments are insufficient to invalidate the endorsement.

The endorsement is sufficiently conspicuous. It is listed on the policy’s declaration page, and the policy itself advises plaintiff to review both the declarations page and the applicable endorsements because those endorsements change the policy terms. The font size used in the endorsement is the same as that used elsewhere in the policy.

Plaintiff provides no support for his assertion that the language of the endorsement is not plain and clear. The meaning of the term “unoccupied” as used in the endorsement has been established by longstanding California case authority. The term is not ambiguous or unclear simply because it is not defined in the policy. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390 [“that a term is not defined in the policies does not make it ambiguous”].)

B. Exclusion for theft in an unoccupied home

Plaintiff’s theft loss was also excluded under paragraph 9b of the “Perils Insured Against” section of the policy applicable to personal property (Coverage C). Paragraph 9b excludes coverage for “loss caused by theft that occurs to property on the residence premises if the dwelling has been vacant or unoccupied for more than 30 consecutive days immediately before the loss.”

Plaintiff’s theft loss occurred while the Woodland Hills home had been unoccupied for more than 30 consecutive days immediately preceding the loss. It was therefore excluded under paragraph 9b of the “Perils Insured Against” section of the policy.

C. Exclusion for theft of construction materials

Plaintiff's theft loss of materials used in the construction of the home was also excluded under paragraph 2c of the "Perils Insured Against" section of the policy applicable to the dwelling (Coverage A) and under paragraph 9b of the "Perils Insured Against" section of the policy applicable to personal property (Coverage C). Both paragraph 2c and paragraph 9b exclude coverage for theft of materials used in the construction of the home until the home is "finished and occupied."

Paragraph 2c provides in part: "[W]e do not insure loss: [¶] . . . [¶] Caused by: [¶] . . . [¶] Theft in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied." Paragraph 9b states that although theft is a peril insured against under the policy, "[t]his peril does not include loss caused by theft . . . [i]n or to a dwelling under construction, or of material and supplies for use in the construction until the dwelling is finished and occupied."

Plaintiff does not dispute that the Woodland Hills home was being renovated at the time of the theft, and that the materials stolen were to be used in the renovation. He argues, however, that the term "under construction" as used in paragraphs 2c and 9b should be interpreted to apply only to new construction, not renovation of an existing home, and that the exclusion therefore does not apply.

The narrow definition proposed by plaintiff was rejected by the California Supreme Court in *TRB Investments*. In that case, the Supreme Court considered the meaning of the term "under construction" in a vacancy exclusion in a commercial property insurance policy. The policy excluded coverage for loss or damage to a vacant building and stated that a building was deemed vacant "when it does not contain enough business personal property to conduct customary operations." (*TRB Investments, supra*, 40 Cal.4th at pp. 23-24.) The policy excepted from the exclusion buildings "under construction" by stating: "Buildings under construction are not considered vacant." (*Id.* at p. 24.) A separate cancellation endorsement allowed the insurer to cancel the policy if the building was vacant or unoccupied for more than 60 days; however, the cancellation provision did not apply to "[b]uildings in the course of construction,

renovation or addition.”” (*Ibid.*) The insured building in *TRB Investments* was unoccupied but undergoing renovation and repair when it sustained water damage. The insurer denied coverage on the ground that the building was vacant at the time. The insurer further argued that the exception for buildings “under construction” did not apply because that exception covered only new construction and not renovation of an existing building. (*Id.* at pp. 25-26.) As support for its argument, the insurer pointed to the language of the cancellation endorsement, which referred specifically to buildings undergoing “construction, renovation or addition.”” The absence of the words “renovation” and “addition” in the vacancy endorsement, the insurer argued, supported a narrower interpretation of the term “under construction” as used in the endorsement. (*Id.* at p. 29.)

The Supreme Court disagreed with the insurer’s interpretation, noting that the “plain meaning” of the term “under construction” encompasses a broad spectrum of building endeavors, including renovating, altering, or repairing an existing building. (*TRB Investments, supra*, 40 Cal.4th at p. 28.) The court in *TRB Investments* then articulated the following standard for determining whether a building is “under construction” for purposes of defining an exception to the policy’s vacancy exclusion: “[W]hether the building project, however characterized, results in ‘substantial continuing activities’ by persons associated with the project at the premises during the relevant time period. [Citations.]” (*Id.* at p. 30.)

We recognize that the Supreme Court in *TRB Investments* interpreted the term “under construction” in the context of an exception to a policy exclusion rather than in an exclusion to coverage under the policy, as is the case here. We also acknowledge that policy exclusions are interpreted narrowly whereas an exception to an exclusion is construed broadly in favor of the insured. (*TRB Investments, supra*, 40 Cal.4th at p. 27.) These principles of insurance policy interpretation do not override equally applicable principles concerning use of the plain, ordinary, and common meaning of a term. Under the “plain meaning” articulated by our Supreme Court in *TRB Investments*, the Woodland Hills home was “under construction” within the meaning of the policy exclusion.

IV. The loss occurred at plaintiff's "residence premises"

Plaintiff contends defendant denied coverage on the ground that the Woodland Hills home was not his "residence premises"³ because the home was "unoccupied" at the time of the loss. If the loss did not occur at the "residence premises," plaintiff argues, then the theft necessarily occurred at a "location other than the residence premises" and falls squarely within the policy's basic property coverage for personal property (Coverage C). Coverage C provides in relevant part as follows:

"We cover personal property owned or used by an insured while it is anywhere in the world. . . . [¶] . . . [¶] Our limit of liability for personal property which is the subject of loss by theft at any location other than the residence premises is 10% of the limit of liability for Coverage C set forth on the Declaration Page, or \$1000, whichever is greater. Personal property in a newly acquired principal residence is not subject to this limitation for the 30 days from the time you begin to move the property there."

Plaintiff further argues that none of the policy exclusions asserted by defendant apply to a claim for theft of personal property under the foregoing policy language. He claims he is entitled to at least \$49,250 in coverage for the theft loss, or 10 percent of the \$492,500 limit of liability for Coverage C set forth on the Declaration page. Alternatively, plaintiff contends the entire amount of his loss is covered because the stolen construction materials constituted "personal property in a newly acquired principal residence" that was moved into the home less than 30 days before the theft.

Plaintiff's argument is flawed for several reasons. Defendant did not deny coverage on the ground that the Woodland Hills home was not plaintiff's "residence premises" but because the policy excludes coverage for loss that occurs while the home is unoccupied. There is no dispute as to whether plaintiff's theft loss occurred at his "residence premises." The loss was excluded because those premises were still under renovation and remained unoccupied for more than 60 consecutive days at the time the

³ The policy defines "residence premises" in relevant part as follows: "a. The one family dwelling, other structures, and grounds; or [¶] b. That part of any other building where you reside and which is shown as the 'residence premises' in the Declarations."

theft occurred. Finally, the Woodland Hills home, purchased nearly a year before the loss occurred, was not “newly acquired” at the time he moved the subsequently stolen construction materials into the home.

V. The trial court did not err

The trial court did not err by granting defendant’s motion for nonsuit.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST